RECORD AND BRIEFS

Supreme Court, U.S.
FILED
AUG 29 2016
OFFICE OF THE CLERK

Nos. 15-1111 & 15-1112

IN THE
Supreme Court of the United States

BANK OF AMERICA CORPORATION, *et al.*, *Petitioners*,
v.
CITY OF MIAMI, FLORIDA, *Respondent*.

WELLS FARGO & CO., *et al.*, *Petitioners*,
v.
CITY OF MIAMI, FLORIDA, *Respondent*.

On Writs Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF THE AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER BANKERS ASSOCIATION, CONSUMER MORTGAGE COALITION, CREDIT UNION NATIONAL ASSOCIATION, HOUSING POLICY COUNCIL OF THE FINANCIAL SERVICES ROUNDTABLE, INDEPENDENT COMMUNITY BANKERS OF AMERICA, MORTGAGE BANKERS ASSOCIATION, AND NATIONAL ASSOCIATION OF FEDERAL CREDIT UNIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Robert A. Long, Jr.
Counsel of Record
Andrew M. Smith
David M. Zionts
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, N.W.
Washington, DC 20001-4956
rlong@cov.com
(202) 662-6000

TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. An "Aggrieved Person" Authorized To Sue Must Fall Within The Zone Of Interests The FHA Protects 7

II. Municipalities Claiming Highly Attenuated Fiscal Burdens Are Not Within The FHA's Zone Of Interests 10

III. Broad Municipal Standing Under The FHA Is Unwarranted In An Era Of Aggressive Federal Enforcement 15

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases

City of Los Angeles v. Bank of America Corp.,
2014 WL 2770083 (C.D. Cal. June 12, 2014)..... 11

City of Los Angeles v. Citigroup Inc.,
24 F. Supp. 3d 940 (C.D. Cal. 2014)..... 11

City of Los Angeles v. JP Morgan Chase & Co.,
Case No. 2:2014-cv-04168 (C.D. Cal., filed
on May 30, 2014) 11

City of Los Angeles v. Wells Fargo & Co.,
2015 WL 4398858 (C.D. Cal. July 17, 2015)..... 15

City of Los Angeles v. Wells Fargo & Co.,
22 F. Supp. 3d 1047 (C.D. Cal. 2014)..... 11

City of Memphis v. Wells Fargo Bank, N.A.,
2011 WL 1706756 (W.D. Tenn. May 4, 2011)..... 11

*City of Miami Gardens v. Bank of America
Corp.*,
No. 1:14-22202 (S.D. Fla., filed on June 13,
2014)..... 11

City of Miami Gardens v. Citigroup, Inc.,
No. 1:14-22204 (S.D. Fla., filed on June 13,
2014)..... 11

City of Miami Gardens v. JPMorgan Chase & Co.,
No. 1:14-22206 (S.D. Fla., filed on June 13, 2014) 12

City of Miami Gardens v. Wells Fargo & Co.,
No. 1:14-22203 (S.D. Fla., filed on June 13, 2014) 11

City of Oakland v. Wells Fargo & Co.,
No. 3:15-cv-04321 (N.D. Cal., filed on Sept. 21, 2015) 12

City of Providence v. Santander Bank, N.A.,
No. 1:14-cv-00244 (D.R.I., filed on May 29, 2014) 11

County of Cook v. Bank of America Corp.,
No. 14 C 2280, 2015 WL 1303313 (N.D. Ill. Mar. 19, 2015) 11

County of Cook v. HSBC N. Am. Holdings Inc.,
No. 14-cv-2031, 2015 WL 5768575 (N.D. Ill. Sept. 30, 2015) 11

County of Cook v. Wells Fargo & Co.,
115 F. Supp. 3d 909 (N.D. Ill. 2015) 11

Davis v. Coca-Cola Bottling Co. Consol.,
516 F.3d 955 (11th Cir. 2008) 19

Dekalb County v. Bank of America Corp.,
No. 1:12-03640 (N.D. Ga., filed on Oct. 18, 2012) 11

Dekalb County v. HSBC N. Am. Holdings, Inc.,
No. 1:12-cv-03640, 2013 WL 7874104 (N.D. Ga. Sept. 25, 2013) 11

Heckler v. Chaney,
470 U.S. 821 (1985) 18

Mayor and City Council of Baltimore v. Wells Fargo Bank, N.A.,
No. JFM-08-62, 2011 WL 1557759 (D. Md. Apr. 22, 2011) 11

Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.,
135 S. Ct. 2507 (2015) 18

Trafficante v. Metro. Life Ins. Co.,
409 U.S. 205 (1972) 16, 17

United States v. Countrywide Fin. Corp.,
Consent Order, No. 2:11-cv-10540 (C.D. Cal. Dec. 28, 2011) 4

United States v. Wells Fargo Bank, N.A.,
Consent Order, No. 1:12-cv-01150 (D.D.C. July 12, 2012) 4

Statutes

42 U.S.C. § 3614 ..... 17, 18

Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (Sept. 13, 1988) 17

Other Authorities

Brian Collins, DOJ, CFPB Officials Warn More 'Redlining' Cases on Way, National Mortgage News, Sept. 3, 2015, http://tinyurl.com/NMNRedlining 18

Congressional Budget Office, Fiscal Stress Faced by Local Governments (Dec. 2010), http://tinyurl.com/CBOMunBudget 11

Department of Justice, Recent Accomplishments of the Housing and Civil Enforcement Section (updated Aug. 4, 2016), http://tinyurl.com/HousingSecAccomp 17

Saikrishna Prakash, *The Chief Prosecutor*, 73 Geo. Wash. L. Rev. 521, 583 (2005) 18

Press Release, City Attorney's Office, City of Oakland files federal lawsuit against Wells Fargo for damages caused by predatory lending (Sept. 22, 2015), http://tinyurl.com/OaklandLendSuit 12

Press Release, Department of Justice, Justice Department Reaches $335 Million Settlement to Resolve Allegations of Lending Discrimination by Countrywide Financial Corporation (Dec. 21, 2011), http://tinyurl.com/DOJCtywideSettle 18

Press Release, Department of Justice, Justice Department Reaches Settlement with Wells Fargo Resulting in More Than $175 Million in Relief for Homeowners to Resolve Fair Lending Claims (July 12, 2012), http://tinyurl.com/DOJWFSettle 18

Kim S. Rueben & Serena Lei, Urban Institute, What the Housing Crisis Means for State and Local Governments (Oct. 2010), http://tinyurl.com/HousingCrisisLocal 11

INTEREST OF AMICI CURIAE[1]

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $13 trillion banking industry and its million employees. ABA members are located in each of the fifty States and the District of Columbia, and include financial institutions of all sizes and types, both large and small. ABA frequently submits *amicus curiae* briefs in state and federal courts in matters that significantly affect its members and the business of banking.

Founded in 1916, the American Financial Services Association ("AFSA") is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

The Consumer Bankers Association ("CBA") is the only national financial trade group focused exclusively on retail banking and personal financial services – banking services geared toward consumers

---

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made any monetary contributions intended to fund the preparation or submission of this brief. The parties have filed with the Clerk letters granting blanket consent to the filing of amicus briefs.

and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

The Consumer Mortgage Coalition ("CMC") is a trade association of national mortgage lenders, servicers, and service providers.

The Credit Union National Association ("CUNA") is the largest organization representing the nation's 6,300 credit unions and their more than 100 million members. Credit unions are member-owned financial cooperatives with the statutory mission of meeting the credit and savings needs of their members, often in low-income, rural or underserved populations.

The Housing Policy Council of The Financial Services Roundtable is a trade association representing thirty-three of the leading national mortgage finance companies. Housing Policy Council member companies originate, service, and insure mortgages for consumers across the nation. The Housing Policy Council's mission is to represent the mortgage and housing marketplace policy views of its member companies in legislative, regulatory, and judicial forums.

The Independent Community Bankers of America ("ICBA"), a national trade association, is the nation's voice for more than 6,000 community banks of all sizes and charter types. ICBA member

community banks seek to improve cities and towns by using local dollars to help families purchase homes and are actively engaged in residential mortgage lending in the communities they serve.

The Mortgage Bankers Association ("MBA") is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies and others in the mortgage lending field.

The National Association of Federal Credit Unions ("NAFCU") is a direct membership organization that independently and strongly represents the interests of all federally-insured credit unions at the federal level. NAFCU is committed to representing, assisting, educating and informing our member credit unions to help them grow, and help grow the credit union industry. NAFCU has close to 800 members and represents over 71% of the assets of federally chartered credit unions.

Amici, on behalf of their members, have a significant interest in ensuring that the Fair Housing Act ("FHA") is enforced in a fair and reasonable way. According to the Eleventh Circuit, however, the category of potential FHA plaintiffs is

essentially limitless, extending to individuals and entities asserting purely economic injuries that have an attenuated connection (if any at all) to any alleged act of discrimination. The novel wave of FHA litigation presently facing lenders poses significant costs without advancing the congressional goals underlying the statute.

INTRODUCTION AND SUMMARY OF ARGUMENT

In recent years the U.S. Department of Justice has vigorously pursued claims of lending discrimination under the Fair Housing Act ("FHA"). As part of settlements the Government has reached with lending institutions, funds have been made available for "allegedly aggrieved persons."[2] In securing compensation for "aggrieved persons," the Justice Department has sought to assist individuals "who obtained a loan" on allegedly improper terms.[3] No municipality has claimed a right to share in these recoveries as an "aggrieved person" based on its lost tax revenue.

Yet the City of Miami and a growing contingent of other municipalities have brought private suits alleging that they *are* "aggrieved" by alleged acts of discrimination against their residents. On this basis, municipalities are seeking damages –

---

[2] *United States v. Countrywide Fin. Corp.*, Consent Order ¶ 4, No. 2:11-cv-10540 (C.D. Cal. Dec. 28, 2011), *available at* http://tinyurl.com/CtywideOrder.

[3] *United States v. Wells Fargo Bank, N.A.*, Consent Order ¶ 17, No. 1:12-cv-01150 (D.D.C. July 12, 2012).

earmarked for their own coffers – that are vastly greater than what the Justice Department has claimed for direct victims of discrimination.

Although the FHA is concerned with protecting the victims of housing discrimination, the injuries over which these cities sue are economic in nature: they assert standing based on the systemic *fiscal* consequences of alleged lending practices. This novel and burdensome species of FHA litigation is neither necessary nor appropriate to enforcing the statute's important anti-discrimination objectives. This Court should hold instead that the "persons aggrieved" who may privately enforce the FHA are those within the statute's zone of interests.

1. This Court traditionally presumes that standing to enforce a statute is limited to those within the zone of interests the statute was enacted to protect. In interpreting who is a "person aggrieved" entitled to sue under Title VII of the Civil Rights Act, the Court held that this language incorporates the traditional zone-of-interests rule. The same result should follow for the virtually identical "aggrieved person" requirement in the Fair Housing Act. Although early decisions under the FHA broadly referred to standing extending to the limits of Article III, this Court has expressly repudiated that language as "ill-considered dictum," and recognized that its FHA precedent is compatible with the zone of interests rule.

2. Municipalities across the country have launched a novel campaign of FHA litigation, seeking to recover for the fiscal impacts of the financial crisis on local governments. The court of appeals' decision in this case ratifies an expansive

approach to standing that allows municipalities – and likely many others – to sue over purely economic injuries that are merely derivative of alleged discrimination against someone else.

These cities are not within the zone of interests protected by the Fair Housing Act. In enacting the FHA, Congress sought to protect individuals' right to fair housing and to live in integrated communities. It demonstrated no concern with cities' interest in protecting their tax revenues as an objective of the FHA. Allowing this novel species of FHA litigation to proceed, moreover, comes at significant cost. As the cases have already begun to demonstrate, the discovery burdens will be enormous. Lenders will face extraordinary settlement pressure, well out of proportion to the actual strength of the cities' claim. And as one court has found, municipalities operating as private litigants may pursue theories that are at odds with the interests of actual consumers.

3. The decisions on which the court of appeals relied concerned individuals attempting to vindicate their right to live in an integrated community – not municipalities invoking economic interests. In finding that residents of apartment complexes where minorities were denied access had statutory standing, the Court emphasized the Federal Government's inability to fully enforce the FHA, and the need for private suits to fill that gap. At the time, the Government was limited in both its authority and resources. The Court recognized that private suits by residents of housing units were necessary to secure the congressional objective of

integration, apartment complex by apartment complex.

Today, however, federal enforcement authorities have been significantly expanded. In particular, the Government is now authorized to secure monetary compensation for victims of discrimination as part of a "pattern or practice" suit. In addition, the Justice Department vigorously enforces the FHA, including by investigating and pursuing the same lending practices that form the basis of the present wave of municipal litigation. But unlike municipalities and their private counsel, the federal Executive is accountable for taking enforcement actions based solely on the public interest. Likewise, class actions may be available for aggrieved individuals, but subject to the protections of the Rule 23 class certification process. These straightforward means of enforcing the FHA underscore how anomalous it would be to confer a right to sue on municipalities complaining of lost tax revenues.

ARGUMENT

I. An "Aggrieved Person" Authorized To Sue Must Fall Within The Zone Of Interests The FHA Protects.

This Court "presume[s] that a statutory cause of action extends only to plaintiffs whose interests 'fall within the zone of interests protected by the law invoked.'" *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). Congress is accordingly "presumed to legislat[e]

against the background of' the zone-of-interests limitation." *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 163 (1997)).

The Court recently applied this principle to Title VII of the Civil Rights Act, which authorizes a "person claiming to be aggrieved" to file a civil action. 42 U.S.C. § 2000e–5(b), (f)(1). The "common usage of the term 'person aggrieved,'" this Court held, "incorporates th[e] [zone-of-interests] test." *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 177-78 (2011). That test, and thus the "person aggrieved" requirement for standing, "exclude[s] plaintiffs who might technically be injured in an Article III sense but whose interests are unrelated to the statutory prohibitions in Title VII." *Id.* at 178.

What is true for employment discrimination under Title VII is true for housing discrimination under Title VIII. The Fair Housing Act, like the Civil Rights Act, authorizes private lawsuits by "[a]n aggrieved person." 42 U.S.C. § 3613(a)(1)(A). "[W]hen Congress uses the same language in two statutes having similar purposes . . . it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005). Accordingly, "aggrieved person" should not be given an aberrational meaning in Fair Housing Act cases. Rather, it should be interpreted based on the same "common usage" and background presumption that Congress authorized only those within the statute's "zone of interests" to sue.

The court of appeals nonetheless authorized precisely what this Court in *Thompson* rejected: lawsuits by anyone who "might technically be injured in an Article III sense but whose interests are unrelated to the statutory prohibitions in [the FHA]." 562 U.S. 170, 178. In reaching this conclusion, the court of appeals considered itself bound by language in this Court's opinions from the 1970s. Bank of Am. Pet. App. 27a-28a. But the decisions in those cases do not adopt such a sweeping approach, and their most expansive language has already been repudiated by this Court as "ill-considered" "dictum." *Thompson*, 562 U.S. at 176.

The first case on which the court of appeals relied is *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972). That decision held that standing under the FHA was not limited to the individual denied housing on discriminatory grounds, but extended to her would-be neighbor, who as a consequence of discrimination was denied her right to *integrated* housing. *Id.* at 208-10. As the Court's opinion makes clear, the statement that statutory standing reaches "as broadly as is permitted by Article III" applies only "*insofar as tenants of the same housing unit* that is charged with discrimination are concerned." *Id.* at 209 (emphasis added); *see also Thompson*, 562 U.S. at 176 (noting that "the *Trafficante* opinion did not adhere to [the Article III dictum] in expressing its Title VIII holding that residents of an apartment complex could sue the owner for his racial discrimination against prospective tenants").

In two subsequent cases the Court repeated this "as broadly as permitted" language, without including the "tenants of the same housing unit" qualifier. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 96-97 (1979); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982). Similar to the plaintiffs in *Trafficante*, the plaintiffs in *Gladstone* and *Havens* were aggrieved because "discriminatory practices . . . deprived them, as residents of the adversely affected area, of the social and professional benefits of living in an integrated society." *Gladstone*, 441 U.S. at 97-98; *see also Havens Realty*, 455 U.S. at 376. Denial of the benefits of integrated housing falls squarely within the heartland of injuries the FHA was enacted to address. Indeed, as this Court noted in *Thompson*, notwithstanding the broad language concerning the outer limits of standing, "the holdings of [these] cases are compatible with the 'zone of interests' limitation." 562 U.S. at 176.

This Court has already repudiated the "ill-considered" "dictum" that animates the court of appeals' expansive view of statutory standing. *Id.* at 176. It should now hold that a person aggrieved under the FHA, like a person aggrieved under the Civil Rights Act, is someone whose injuries fall within the anti-discrimination, pro-integration interests Congress sought to vindicate.

II. Municipalities Claiming Highly Attenuated Fiscal Burdens Are Not Within The FHA's Zone Of Interests.

This case is part of a wave of litigation that seeks to test the outer limits of standing under the

FHA. Following the financial crisis, many municipalities faced shortfalls in their budgets.[4] Economists have recognized the complexities involved in tracing the impact of the financial crisis on local governments.[5] A number of cities, however, have attempted to draw a straight line connecting these economic losses to particular lending practices of individual banks. Drawing on a shared pattern of allegations and legal theories (and, in many instances, shared private counsel), these municipalities have inaugurated a new and growing species of FHA litigation.[6] Just three weeks after

---

[4] *See* Congressional Budget Office, Fiscal Stress Faced by Local Governments (Dec. 2010), http://tinyurl.com/CBOMunBudget.

[5] *See* Kim S. Rueben & Serena Lei, Urban Institute, What the Housing Crisis Means for State and Local Governments (Oct. 2010), http://tinyurl.com/HousingCrisisLocal.

[6] *See County of Cook v. Wells Fargo & Co.*, 115 F Supp. 3d 909 (N.D. Ill. 2015); *County of Cook v. Bank of America Corp.*, No. 14 C 2280, 2015 WL 1303313 (N.D. Ill. Mar. 19, 2015); *County of Cook v. HSBC N. Am. Holdings Inc.*, No. 14-cv-2031, 2015 WL 5768575 (N.D. Ill. Sept. 30, 2015); *Mayor and City Council of Baltimore v. Wells Fargo Bank, N.A.*, No. JFM-08-62, 2011 WL 1557759 (D. Md. Apr. 22, 2011); *City of Memphis v. Wells Fargo Bank, N.A.*, 2011 WL 1706756 (W.D. Tenn. May 4, 2011); *Dekalb County v. HSBC N. Am. Holdings, Inc.*, No. 1:12-cv-03640, 2013 WL 7874104 (N.D. Ga. Sept. 25, 2013); *Dekalb County v. Bank of America Corp.*, No. 1:12-03640 (N.D. Ga., filed on Oct. 18, 2012); *City of Los Angeles v. Bank of America Corp.*, 2014 WL 2770083 (C.D. Cal. June 12, 2014); *City of Los Angeles v. Citigroup Inc.*, 24 F. Supp. 3d 940 (C.D. Cal. 2014); *City of Los Angeles v. Wells Fargo & Co.*, 22 F. Supp. 3d 1047 (C.D. Cal. 2014); *City of Los Angeles v. JP Morgan Chase & Co.*, No. 2:2014-cv-04168 (C.D. Cal., filed on May 30, 2014); *City of Providence v. Santander Bank, N.A.*, No. 1:14-cv-00244 (D.R.I., filed on May 29, 2014); *City of Miami Gardens v. Bank of America Corp.*, No. 1:14-22202 (S.D. Fla., filed on June 13, 2014); *City of Miami Gardens v. Wells Fargo & Co.*, No. 1:14-
(continued...)

the Eleventh Circuit issued its decisions in this case, for example, the City of Oakland filed one of these suits and specifically noted that a federal court of appeals had approved the strategy.[7]

These municipalities are attempting to sue over lending practices directed at others, on the basis that, far down the chain of causation, they lost tax revenue and paid more for policing and other services as a result of the challenged practices. The purpose of the FHA, however, is to protect minorities from housing discrimination, and to secure for all Americans "the benefits of living in an integrated society." *Gladstone*, 441 U.S. at 95. No one would suggest that when Congress acted to secure fair housing in 1968, it also was concerned with protecting the tax bases and budgets of cities and towns.

A rule of standing based on derivative economic injury would expose lenders to new and unquantifiable risks with no apparent limiting principle. Under the Eleventh Circuit's open-ended approach to standing under the FHA, homeowners

---

22203 (S.D. Fla., filed on June 13, 2014); *City of Miami Gardens v. Citigroup, Inc.*, No. 1:14-22204 (S.D. Fla., filed on June 13, 2014); *City of Miami Gardens v. JPMorgan Chase & Co.*, No. 1:14-22206 (S.D. Fla., filed on June 13, 2014); *City of Oakland v. Wells Fargo & Co.*, No. 3:15-cv-04321 (N.D. Cal., filed on Sept. 21, 2015).

[7] *See* Press Release, City Attorney's Office, City of Oakland files federal lawsuit against Wells Fargo for damages caused by predatory lending (Sept. 22, 2015), http://tinyurl.com/OaklandLendSuit.

could likely sue by alleging a decrease in property value from neighboring foreclosures. In the City of Oakland's lawsuit, for example, the complaint estimates that in that city alone, "impacted homeowners could experience property devaluation of $53 billion."[8] By the municipalities' logic, every one of these homeowners could bring an FHA lawsuit based on allegedly discriminatory loans made to their neighbors. Even local grocery stores, hardware stores, and other businesses located in struggling neighborhoods could seemingly sue on the basis that lending patterns affected local economic conditions which in turn affected their bottom lines. Without a meaningful zone of interests requirement, the biggest limit on standing under the FHA would be the creativity of counsel.

The rule the court of appeals adopted is inconsistent with the caution this Court has said is warranted before extending the FHA to "novel theor[ies] of liability." *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.* ("*Inclusive Communities*"), 135 S. Ct. 2507, 2512 (2015). At least one of the cities involved in the current litigation campaign, the City of Los Angeles, has candidly admitted that its lawsuit was an "innovative idea" suggested to it by private counsel.[9]

---

[8] *City of Oakland v. Wells Fargo & Co.*, Complaint ¶ 69, No. 3:15-cv-04321 (N.D. Cal., filed on Sept. 21, 2015).

[9] Los Angeles City Council, Motion, File No. 11-1972 (adopted Dec. 14, 2011), *available at* http://tinyurl.com/LA11-1972 ("The Cochran Firm has approached the City with an innovative idea to pursue litigation against several large banking institutions.").

"Innovative" uses of the FHA to vindicate economic interests in this manner simply distract from the important concerns that motivated Congress to enact the law.

The cities' sweeping new theory of standing, moreover, entails significant cost for the judicial system. As the court of appeals correctly recognized, there will be tremendous practical difficulties in litigating a lender's liability for an entire city's foreclosures and allocating responsibility for lost tax revenues. *See* Bank of Am. Pet. App. 19a ("It may well be difficult to prove which foreclosures resulted from discriminatory lending, how much tax revenue was actually lost as a result of the Bank's behavior, etc."). But the court offered no guidance on how those difficulties could be overcome. Instead, the Eleventh Circuit took false comfort in deferring the issues to "a subsequent stage in the litigation." *Id.*

One district court is already facing the challenges at this "subsequent stage": a lender disclosed to Cook County information on more than 260,000 separate loans in just the first phase of discovery, and prior to certiorari being granted in this case, the county suggested that the process continue for another year.[10] (The *Cook County* case has since been stayed.) If ordinary statutory standing principles do not limit these types of suits, defendants will at a minimum face enormous costs in

---

[10] *See County of Cook v. Bank of Am. Corp.*, No. 14-cv-2280, Plaintiff's Report Regarding Outstanding Discovery Disputes, at 2, 19-20 (Dkt. No. 104) (N.D. Ill., Mar. 12, 2016).

conducting discovery and litigating the claims. Eventually, moreover, individual district judges will be faced with the unenviable task of determining how much tax revenue cities have lost, or how many new police officers they had to hire, as a consequence of specific lending decisions.

Even a lender with strong defenses will have to consider the unpredictability of outcomes under this untested theory, as individual judges and juries around the country attempt to adjudicate the economic consequences of the financial crisis, one city at a time. In light of the hundreds of millions of dollars being sought in *each* of the many cases that have already been brought, lenders may face extraordinary settlement pressure, well out of proportion to the actual strength of the cities' claims. More broadly, the City's legal theories underlying these lawsuits may well harm the actual borrowers. As one court has already noted, "[i]n the name of advocating on behalf of minority borrowers, the City decided to fight for an outcome that would hurt those same borrowers." *City of Los Angeles v. Wells Fargo & Co.*, 2015 WL 4398858, at *13 (C.D. Cal. July 17, 2015).

III. Broad Municipal Standing Under The FHA Is Unwarranted In An Era Of Aggressive Federal Enforcement.

Applying the traditional zone of interests limitation on standing under the FHA would limit adventurous litigation of the sort attempted by the City of Miami, but it would not impede appropriate enforcement of the law. The question in a statutory standing case is not *whether* a claim can be brought

at all, but *who* is the proper plaintiff to bring it. A range of potential plaintiffs are available to bring housing discrimination claims; municipalities pursuing their own fiscal agendas are just not among them.

The full scope of FHA enforcement available today is noteworthy in light of the *Trafficante* Court's concerns over adequate protection of the statute's goals. In recognizing a role for a particular class of plaintiffs in *Trafficante* (residents of segregated housing units), this Court emphasized that private suits would be the "main generating force" for enforcement of the FHA. 409 U.S. at 210-11. It noted that the Department of Housing and Urban Development "ha[d] no enforcement powers," that the Justice Department "may sue only to correct 'a pattern or practice' of housing discrimination," and that even that power was wielded by a staff of "less than two dozen lawyers." *Id.*

That diagnosis made sense at the time *Trafficante* was decided, and in the context of that decision. Congress plainly focused on promoting integrated housing, and the federal government had neither the authority nor capability to vindicate that interest apartment complex by apartment complex. Here, however, municipalities are attempting to bring the very "pattern or practice" cases that are within the ambit of the Justice Department. *See* Bank of Am. Pet. App. 41a ("The City maintains that it has alleged a *pattern and practice* of discriminatory lending by the Bank." (emphasis added)). Moreover, direct victims of such alleged patterns or practices of discrimination could

potentially bring class actions, provided Rule 23 could be satisfied. Under these circumstances municipal lawsuits contribute nothing to vindicating Congress's anti-discrimination objectives, while imposing significant costs and denying defendants critical protections.

As a matter of law, the federal government's enforcement powers have significantly increased since *Trafficante*. The Fair Housing Amendments Act of 1988 provided a new enforcement role for the Department of Housing and Urban Development. Pub. L. No. 100-430, § 8, 102 Stat. 1619 (Sept. 13, 1988), 42 U.S.C. § 3612. Most significantly, the 1988 Amendments authorized the Justice Department to secure "monetary damages [for] persons aggrieved" by patterns or practices of discrimination. *Id.* § 8, 42 U.S.C. § 3614(d).

In terms of practical capabilities, moreover, the Justice Department's Housing and Civil Enforcement Section is long past the days of "less than two dozen lawyers." *Trafficante*, 409 U.S. at 211. Today the Department vigorously enforces the FHA.[11] In fact, the federal government has pursued the same lending practices over which municipalities have attempted to sue, and entered into settlements with lenders over such practices.[12] Notably, as part of these settlements the Justice Department has

---

[11] *See* Department of Justice, Recent Accomplishments of the Housing and Civil Enforcement Section (updated Aug. 4, 2016), http://tinyurl.com/HousingSecAccomp.

[12] *Id.*

secured funds for "aggrieved persons" – without ever suggesting that cities could claim those funds to recover the losses to their tax revenue.[13]

There may well be grounds to question federal enforcement policies, including in light of the limitations on disparate impact liability the Court recently announced in *Inclusive Communities*. But there is no question that Congress delegated to the Attorney General – not individual municipalities – the role of prosecuting alleged "patterns or practices" of housing discrimination. 42 U.S.C. § 3614(a). This delegation reflects the expertise the federal government can bring to bear on complex enforcement questions, as well as the Executive's accountability for enforcing the law in the public interest.[14] By contrast, a municipality pursuing fiscal concerns, and represented by private counsel working for a contingency fee, has no obligation to act in the public interest. Instead, it has an

---

[13] Press Release, Department of Justice, Justice Department Reaches $335 Million Settlement to Resolve Allegations of Lending Discrimination by Countrywide Financial Corporation (Dec. 21, 2011), http://tinyurl.com/DOJCtywideSettle; Press Release, Department of Justice, Justice Department Reaches Settlement with Wells Fargo Resulting in More Than $175 Million in Relief for Homeowners to Resolve Fair Lending Claims (July 12, 2012), http://tinyurl.com/DOJWFSettle; *see also* Brian Collins, DOJ, CFPB Officials Warn More 'Redlining' Cases on Way, National Mortgage News, Sept. 3, 2015, http://tinyurl.com/NMNRedlining.

[14] *See Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985); Saikrishna Prakash, *The Chief Prosecutor*, 73 Geo. Wash. L. Rev. 521, 583 (2005) ("One reason the Founders opted for a unitary executive was to ensure that one executive would be accountable for law enforcement choices.").

incentive to bring whatever claims it believes can yield the largest possible settlement.

To the extent directly-affected mortgage holders are dissatisfied with the Government's enforcement of the FHA, they plainly would have standing to seek their own individual relief. And provided the Rule 23 requirements could be satisfied, a class action alleging a "pattern or practice" claim could be available. Indeed, municipal FHA cases resemble major class actions in scope and complexity, with two critical differences. First, the procedural protections afforded by the class certification process would be absent.[15] And second, any recovery would be monopolized by municipal budgets, rather than offering relief directly to the victims of discrimination.

There is, in sum, no shortage of proper plaintiffs to challenge allegedly discriminatory lending practices. The Federal Government has the power and capability to pursue "pattern or practice" actions against lenders, and to do so in a properly tailored way based on an assessment of the public interest. Likewise, individual victims of alleged discriminatory acts can, to the extent they are not made whole by Justice Department settlements, pursue relief on their own. There is no justification for inviting a flood of FHA litigation by cities across

---

[15] Notably, courts faced with private Title VII lawsuits have insisted that "pattern or practice" claims be brought only through the rubric of a class action. *See Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 967-69 (11th Cir. 2008).

the country, and potentially other types of plaintiffs as well, to pursue separate "pattern or practice" claims based on their derivative economic interests.

CONCLUSION

For the foregoing reasons, and the reasons set forth by Petitioners, the judgment of the court of appeals should be reversed.

Respectfully submitted,

Robert A. Long, Jr.
Andrew M. Smith
David M. Zionts
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, N.W.
Washington, DC 20001-4956
rlong@cov.com
(202) 662-6000

August 2016